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No. 03-1116

IN THE

Supreme Court of the United States

JENNIFER M. GRANHOLM,
Governor of Michigan, *et al.*,

Petitioners,

v.

ELEANOR HEALD, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF AMICUS CURIAE WINE INSTITUTE IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Page

Table of Cited Authorities ii

Interest of Amicus Curiae 1

Summary of Argument 2

Argument 3

I. Michigan's Discriminatory Scheme Is Invalid Because The State Failed To Show That There Are No "Nondiscriminatory Alternatives." 3

II. In Fact, Other States Have Adopted Reasonable "Nondiscriminatory Alternatives" That Allow And Regulate Direct Shipments Of Wine To Consumers, Without Discriminating Against Out-Of-State Wineries. 5

III. In States Allowing And Regulating Direct Shipments Of Wine To Consumers, Common Carriers Put In Place Policies And Procedures To Ensure Compliance With State Regulations. 13

Conclusion 14

Appendix 1a

TABLE OF CITED AUTHORITIES

Page

Cases:

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996) 1

Bacchus Imports, Ltd. v. Dias,
468 U.S. 263 (1984) 1, 2, 4

C & A Carbone, Inc.
v. Town of Clarkstown, New York,
511 U.S. 383 (1994) 2, 3

Cooper v. McBeath,
11 F.3d 547 (5th Cir. 1994) 4, 12

Heald v. Engler,
342 F.3d 517 (6th Cir. 2003) 3

Healy v. Beer Institute, Inc.,
491 U.S. 324 (1989) 4

Kraft General Foods, Inc.
v. Iowa Dept. of Rev. & Fin.,
505 U.S. 71 (1992) 4

New Energy Co. of Ind. v. Limbach,
486 U.S. 269 (1988) 2, 3

United States Constitution:

Twenty-First Amendment 1, 2, 4

Cited Authorities

Page

Statutes and Codes:

New Hampshire Revised Statutes Annotated
Section 178:27(V) (2003) 9, 11

New Hampshire Revised Statutes Annotated
Section 178.27(VII) (2003) 10

North Carolina General Statutes
Section 18B-1001.1(c) (2004) 6, 7
Section 18B-1001.1(d) (2004) 9

North Dakota Century Code
Section 5-01-16(5) (2003) 10, 11

South Carolina Code Annotated
Section 61-4-747(C)(6) (2003) 9

Virginia Annotated Code
Section 4.1-112.1(c) (2004) 7

Wisconsin Statutes Annotated
Section 125.58(4)(a)(4) (2004) 11

Wyoming Statutes Annotated
Section 12-2-204(d)(v) (2003) 9, 11
Section 12-2-204(d)(vi) (2003) 11

Other Authorities:

Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine*, p. 31
(July 2003) 6, 8, 13, 14

The Wine Institute respectfully submits this brief as amicus curiae in support of respondents. This brief is filed with the written consent of all parties.[1]

INTEREST OF AMICUS CURIAE

Wine Institute is an association of nearly 800 California wineries and affiliated businesses dedicated to advocating public policy to enhance the environment for the responsible consumption and enjoyment of wine. Wine Institute's members are responsible for more than 80 percent of the wine production in the United States.

Wine Institute acts as a voice for the wine industry to educate public policy leaders and to promote fair access to markets for wine. Since its beginning in 1934, Wine Institute has worked to create a climate in which California's wine industry can thrive and prosper. Wine Institute has submitted amicus briefs to this Court in several prior cases defining the boundaries of the 21st Amendment, including *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), and *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996).

To help California wineries expand their national markets, Wine Institute has been a proponent of direct shipping legislation since 1985, when it was the first wine industry organization to successfully urge the passage of such state legislation. Over the past 19 years, Wine Institute has actively sought state legislative solutions allowing direct shipping of wine. Wine Institute's efforts have resulted in the adoption of such laws in a majority of states across the country.

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1. This brief was not authored in whole or in part by the counsel for any party. No person or entity, other than Wine Institute, made a monetary contribution to the preparation or submission of this brief.

Wine Institute's interest in this case is to bring to the Court's attention several of the successful solutions that many states have adopted to allow and regulate direct shipments of wine to consumers. These legislative solutions have fully protected the interests of the states without discriminating against out-of-state wineries.

SUMMARY OF ARGUMENT

Michigan's discriminatory scheme is invalid because the State failed to show that there are no "nondiscriminatory alternatives." Discrimination is "*per se* invalid" unless a State can "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 392 (1994). A state must show that a discriminatory statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). The 21st Amendment does not save Michigan's discriminatory scheme. *See Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984)

In fact, numerous States have adopted reasonable "nondisciminatory alternatives" that allow and regulate direct shipments of wine to consumers, without discriminating against out-of-state wineries. States have adopted statutes that ensure that sales are not made to minors. Statutes also often provide for collection of taxes. The statutes adopted by these States also provide for effective enforcement. The examples herein show that other States have adopted reasonable "nondiscriminatory alternatives" that allow and regulate direct shipments without discriminating against out-of-state wineries. Michigan's discriminatory scheme is invalid.

ARGUMENT

I. Michigan's Discriminatory Scheme Is Invalid Because The State Failed To Show That There Are No "Nondiscriminatory Alternatives."

The Sixth Circuit correctly held that Michigan's discriminatory scheme is invalid because the State failed to show that there are no "nondiscriminatory alternatives": The State had "not shown that the Michigan scheme's discrimination between in-state and out-of-state wineries furthers any" legitimate concerns, "much less that no reasonable non-discriminatory means exist to satisfy these concerns." *Heald v. Engler*, 342 F.3d 517, 526 (6th Cir. 2003). The Sixth Circuit explained:

> The proper inquiry . . . is whether [the regulatory scheme] "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 278 (1988). . . . We find no evidence on the record that it does.

Heald, 342 F.3d at 527.

This Court has emphasized that discrimination against interstate commerce is "*per se* invalid" unless a State can "demonstrate, under rigorous scrutiny, that it has no other means to advance a legitimate local interest." *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 392 (1994). A state must show that a discriminatory statute "advances a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives." *New Energy*, 486 U.S. at 278. In determining whether there are non-discriminatory alternatives to a discriminatory statute, the courts

may look to the approach taken by other states to advance similar goals. *See Kraft General Foods, Inc. v. Iowa Dept. of Rev. & Fin.*, 505 U.S. 71, 81 (1992).[2]

The 21st Amendment does not save Michigan's discriminatory scheme. In *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984), this Court explained that although the 21st Amendment may give states more authority to legislate "to combat the perceived evils of an unrestricted traffic in liquor" (468 U.S. at 276), "laws that constitute mere economic protectionism are . . . not entitled to the same deference" (*ibid.*). "The central purpose of . . . [Section 2 of the 21st Amendment] was not to empower States to favor local liquor industries by erecting barriers to competition." *Ibid.*; *see Healy v. Beer Institute, Inc.*, 491 U.S. 324, 344 (1989) (Scalia, J., concurring) (the discriminatory character of a law regulating the sale of alcoholic beverages "eliminates the immunity afforded by the Twenty-first Amendment"). *See also Cooper v. McBeath*, 11 F.3d 547, 555 (5th Cir. 1994) (noting that "the core concerns underlying the Twenty-first Amendment are not entitled to greater weight than the principle of nondiscrimination animating the Commerce Clause").

2. In *Kraft*, this Court noted that a "marginal loss in convenience" to a state in an alternative approach would not justify discriminatory state legislation. *Kraft*, 505 U.S. at 81-82.

II. In Fact, Other States Have Adopted Reasonable "Nondiscriminatory Alternatives" That Allow And Regulate Direct Shipments Of Wine To Consumers, Without Discriminating Against Out-Of-State Wineries.

Numerous States have adopted reasonable "nondiscriminatory alternatives" that allow and regulate direct shipments of wine to consumers without discriminating against out-of-state wineries. In fact, 26 States now allow and regulate interstate direct shipments of wine to consumers.[3]

Michigan asserts several purported interests in discriminating against out-of-state wineries — ensuring that sales are not made to minors, ensuring collection of taxes, and providing for effective enforcement. However, there are "nondiscriminatory alternatives"

3. Those states are: Alaska, Arizona, California, Colorado, Georgia, Hawaii, Idaho, Illinois, Iowa, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Virginia, Washington, Wisconsin, West Virginia, and Wyoming.

Indeed, direct shipping of wine to consumers is allowed and regulated by many of the States joining in the Brief of Ohio and 32 Other States as *Amici Curiae* supporting Petitioners ("Ohio Amicus Brief"). The Ohio *A*micus Brief recognizes that in those States, "State residents are permitted to have certain amounts of alcohol shipped directly or personally transported to their homes, if State requirements are met." Ohio Amicus Brief, p. 20. The Ohio Amicus Brief then lists various States allowing and regulating direct shipping, including numerous States joining in that brief (Alabama, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Louisiana, Minnesota, Missouri, Nebraska, Nevada, New Jersey, Pennsylvania, Rhode Island, Vermont and Wisconsin). *See* Ohio Amicus Brief, Appendix A. thereto. Yet, the Ohio Amicus Brief erroneously characterizes the issue as whether States must allow "[u]nrestricted direct shipments from out-of-state wineries" (Ohio Amicus Brief, p. 21).

addressing each of these interests. States have adopted "nondiscriminatory alternatives" that address these interests, while allowing and regulating direct shipment.

States have adopted statutes that ensure that sales are not made to minors.[4] For example, North Carolina allows direct shipments only by approved common carriers, who must

> (1) Require the recipient, upon delivery, to demonstrate that the recipient is at least 21 years of age by providing a form of identification specified in G.S. 18B-302(d)(1).
>
> (2) Require the recipient to sign an electronic or paper form or other acknowledgement of receipt as approved by the Commission.
>
> (3) Refuse delivery when the proposed recipient appears to be under 21 years and refuses to present valid identification as required by subdivision (1) of this subsection.
>
> (4) Submit any other information that the Commission shall require.

N.C. Gen. Stat. § 18B-1001.1(c) (2004).

4. *See* Federal Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Wine* at 31 (July 2003) at http://www.ftc.gov/os/2003/07/winereport2.pdf (hereinafter FTC Report) ("state officials report that they have experienced few, if any problems with interstate direct shipment of wine to minors").

North Carolina requires that wine packages be clearly marked and makes both wine shippers and common carriers potentially liable for any deliveries to minors:

> All wine shipper permittees shipping wines pursuant to this section shall affix a notice in 26-point type or larger to the outside of each package of wine shipped within or to the State in a conspicuous location stating: 'CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY.' Any delivery of wines to a person under 21 years of age by a common carrier shall constitute a violation of G.S. 18B-302(a)(1) by the common carrier. The common carrier and the wine shipper permittee shall be liable only for their independent acts.

N.C. Gen. Stat. § 18B-1001.1(c) (2004).[5]

5. *See, e.g.*, Va. Code Ann. § 4.1-112.1(c) (2004):

> The direct shipment of beer and wine by holders of licenses issued pursuant to this section shall be by approved common carrier only. The Board shall develop regulations pursuant to which common carriers may apply for approval to provide common carriage of wine or beer, or both, shipped by holders of licenses issued pursuant to this section. Such regulations shall include provisions that require (i) the recipient to demonstrate, upon delivery, that he is at least 21 years of age; (ii) the recipient to sign an electronic or paper form or other acknowledgment of receipt as approved by the Board; and (iii) the Board-approved common carrier to submit

(Cont'd)

These statutes can also provide for collection of taxes.[6] New Hampshire's statute provides, for example:

> Direct shippers shall file invoices for each shipment with the liquor commission showing the retail price of the product, and shall pay a fee of 8 percent of the retail price for shipments of liquor, wine, beer, or beverage to the commission. Such filings shall be monthly, and arrive at the commission no later than the tenth of the month following shipment. Direct shippers shall maintain records for at least 3 years which will permit the commission to ascertain the truthfulness of the information filed and permit the commission to perform an audit of the direct shipper's filings upon reasonable request.

N.H. Rev. Stat. Ann. § 178:27(V) (2003).[7]

The statutes adopted by these States also provide for effective enforcement. Statutes can provide that licensed out-of-state shippers are deemed to have consented to the State's jurisdiction. In South Carolina, an out-of-state shipper licensee shall

> be deemed to have consented to the jurisdiction of the department or another state agency and the courts of this State concerning enforcement of this section and any related laws.

S.C. Code Ann. § 61-4-747(C)(6) (2003).[8]

(Cont'd)

> to the Board such information as the Board may prescribe. The Board-approved common carrier shall refuse delivery when the proposed recipient appears to be under the age of 21 years and refuses to present valid identification. All licensees shipping wine or beer pursuant to this section shall affix a conspicuous notice in 16 point type or larger to the outside of each package of wine or beer shipped within or into the Commonwealth, in a conspicuous location stating: 'CONTAINS ALCOHOLIC BEVERAGES; SIGNATURE OF PERSON AGED 21 YEARS OR OLDER REQUIRED FOR DELIVERY." Any delivery of alcoholic beverages to a minor by a common carrier shall constitute a violation by the common carrier. The common carrier and the shipper licensee shall be liable only for their independent acts.

6. *See* FTC Report at 38 ("Many states have adopted less restrictive means of regulating direct shipping, and these states report few or no problems with tax collection").

7. *See, e.g.*, Wyo. Stat. Ann. § 12-2-204(d)(v) (2003):

> [Out-of-state shippers shall]
>
> Remit a tax of twelve percent (12%) of the retail price for each shipment of manufactured wine to the liquor division. Each out-of-state shipper shall file a monthly report with the liquor division and include a copy of the invoice for each shipment of manufactured wine and remit any tax due. The report shall be filed with the liquor division not later than the tenth of the month following the month in which the shipment was made. . . .

8. *See, e.g.*, N.C. Gen. Stat. § 18B-1001.1(d) (2004):

> A wine shipper permittee shall be subject to jurisdiction of the North Carolina courts by virtue of applying for a wine shipper permit and shall comply with any audit or other compliance requirements of the Commission and the Department of Revenue.

Out-of-state shippers who violate State laws regulating direct shipments may be subject to fines, suspension or revocation of their licenses, or criminal prosecution.[9] State statutes can also provide for the filing by the State of an action to enjoin violations of direct shipping statutes, and allow the recovery of costs and attorneys' fees by the State.[10]

Moreover, an out-of-state shipper who violates a State's laws risks sanctions imposed not only by that State, but also by the United States and the shipper's own state. North Dakota has adopted a statutory provision directly addressing that possibility:

> Upon determination by the state treasurer that an illegal sale or shipment of alcoholic beverages has been made to a consumer in this state by either a manufacturer or retailer of alcoholic beverages, the state treasurer may notify both the bureau of alcohol, tobacco, and firearms of the United States department of the treasury and the licensing authority

9. *See, e.g.*, N.H. Rev. Stat. Ann. § 178.27(VII) (2003):

> [A]ny person holding a direct shippers permit under this section who ships liquor, wine or beer to a person under 21 years of age, shall be guilty of a class B felony and shall have such permit permanently revoked.

10. *See* N.D. Cent. Code § 5-01-16(5) (2003):

> The state tax commissioner may initiate and maintain an action in a court of competent jurisdiction to enjoin a violation of this subsection and may request award of all costs and attorneys' fees incurred by the state incidental to that action.

> for the state in which the manufacturer or retailer is domiciled that a state law pertaining to the regulation of alcoholic beverages has been violated and may request those agencies to take appropriate action.

N.D. Cent. Code § 5-01-16(5) (2003).

As indicated above, States can adopt statutes that include reporting requirements to assist enforcement by the State. *See* N.H. Rev. Stat. Ann. § 178:27(V) (2003) & Wyo. Stat. Ann. § 12-2-204(d)(v) (2003). These requirements can be extensive; Wisconsin allows direct shipment only if:

> The winery submits a report to the department by January 31 of each year, on forms furnished by the department, providing the identity, quantity, and price of all products shipped into this state during the previous calendar year, along with the name, address, and birthdate of each person who purchased these products and each person to whom these products were shipped. . . .

Wis. Stat. Ann. § 125.58(4)(a)(4) (2004). These statutes can include provisions requiring out-of-state sellers to retain records and consent to audits by the State.[11]

11. *See, e.g.*, Wyo. Stat. Ann. § 12-2-204(d)(vi) (2003):

> [Out-of-state shippers shall]
>
> (vi) Maintain records for at least three (3) years as will permit the liquor division to ascertain the truthfulness of the information filed and permit the division to perform an audit of the licensee's records upon reasonable request.

The Fifth Circuit in *Cooper v. McBeath*, 11 F.3d 547 (5th Cir. 1994), aptly noted that a State can conduct out-of-state investigations as easily as in-state investigations, In *Cooper*, the Fifth Circuit rejected an argument that Texas' residence requirement for liquor permits was justified by the need to investigate applicants:

> In this age of split-second communications by means of computer networks, fax machines, and other technological marvels, there is no shortage of less burdensome, yet still suitable, options. At first blush, interstate investigations would seem hardly more difficult then intrastate ones. If [a State] desires to scrutinize its applicants thoroughly, as is its right, it can devise non-discriminatory means. . . .

Cooper, 11 F.3d at 554.

In summary, these examples show that other States have adopted reasonable "nondiscriminatory alternatives" that allow and regulate direct shipments without discriminating against out-of-state wineries. Indeed, the fact that Michigan itself allows *intrastate* direct shipment casts serious doubt upon Michigan's purported policy concerns. For example, even if there were isolated problems with direct shipment of wine to minors, any such problems could arise with either interstate or intrastate shipment. Such concerns would not justify statutory schemes discriminating against out-of-state wineries.

Thus, Michigan's discriminatory scheme is invalid.

III. In States Allowing And Regulating Direct Shipments Of Wine To Consumers, Common Carriers Put In Place Policies And Procedures To Ensure Compliance With State Regulations.

Once a State adopts a statute allowing and regulating direct shipments of wine to consumers, common carriers are then in a position to help ensure compliance with State regulations. The Federal Trade Commission has found that both FedEx and UPS, for example, have adopted policies that require their couriers to obtain adult signatures. *See* FTC Report at 36-37.

FedEx's required customer agreement states that "[e]ach recipient must sign for shipments received and be prepared to provide proof of identification and age at the time the package is received." *Id.* at 36. FedEx requires that recipients must be 21 years old and show valid identification; all packages containing wine must have a label prominently warning that an adult signature is required.[12] *Id.* In addition, FedEx verifies the liquor licenses of its wine shippers. *Id.* at 37.[13]

Similarly, UPS requires an adult signature for all wine deliveries. *Id.* For all alcohol shipments, UPS requires that the package's barcode tells the courier that an adult signature is

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12. A sample label is reproduced as an Appendix at the end of this brief.

13. Members of Wine Institute can enroll in FedEx's program for direct shipment of wine to consumers. The wine shipper must furnish FedEx with copies of its liquor licenses/permits; FedEx then determines that the shipper is properly licensed. If the shipper is approved for the program, the shipper must sign an agreement in which the shipper agrees to comply with FedEx's requirements and all applicable laws.

required. *Id.* UPS instructs its drivers to request an identification if the recipient does not appear to be 21 years of age or older. *Id.* If a shipper tries to ship wine without proper labels requiring an adult signature, UPS notifies the shipper that further infractions could result in termination of UPS's services. *Id.*

Thus, where a State allows and regulates direct shipments, FedEx, UPS and other common carriers train their couriers and put in place policies and procedures to further ensure that sales are not made to minors. This again confirms that there are reasonable "nondiscriminatory alternatives" by which States can allow and regulate direct shipments of wine to consumers without discriminating against out-of-state wineries.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

Special Delivery Instructions
ADULT SIGNATURE REQUIRED
Recipient must be at least 21 years of age.
Do not deliver to an intoxicated person.
Indirect delivery is allowed in all states except
for HI, IL, IA, MO, NE, NH, NJ, NC, NJ.
No signature release or driver release allowed.
This Package Contains Alcohol.
SHIPPER CERTIFIES:
From an on-site purchase;
Complies with applicable regulations;
Is approved for delivery.
SEL 154 04/03
FedEx.